MOTION FILED
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No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

MOTION OF AMERICAN AIRLINES, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Airlines, Inc. (hereafter "American") respectfully moves for leave to file the attached brief as *amicus curiae* in this case. Petitioner's attorneys have consented to the filing of this brief. The consent of the attorneys for the respondent was requested but refused.

American is currently a defendant in an antitrust action. One of the issues in that litigation is the application of the antitrust "essential facilities" doctrine. While American firmly believes that the doctrine has no application to its case, its opponents urge the reverse. Since the Court's decision in the instant case may have a significant impact on the law concerning the "essential facilities" doctrine, it may, therefore, have a material impact on the outcome of the litigation in which American is a party.

American seeks to raise an issue not yet clearly developed by either party to these proceedings. To date, the litigants have concerned themselves most directly with the legal questions surrounding the issue of a refusal to deal. Yet, in the instant case the Court of Appeals for the Tenth Circuit also addressed the issue of the liability of a party which has not refused to deal. Specifically, the question is whether under the "essential facilities" doctrine, the courts may not only require a party to deal with a competitor, but may also establish the terms on which that relationship must be predicated. This is an important and largely uncharted legal issue. If American's concerns are not allowed to be expressed in this proceeding, fundamental questions of law which may materially affect

it might be decided without a proper ventilation of the issues.

For these reasons, American requests leave to file this brief as *amicus curiae* on behalf of petitioner.

Respectfully submitted,

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BRIEF OF AMERICAN AIRLINES, INC. AS AMICUS CURIAE

INTRODUCTION AND STATEMENT OF INTEREST

This case involves a claim in which a firm has demanded access to the facilities of its competitor, and has insisted that those facilities be made available on terms satisfactory to it. American Airlines, Inc. ("American") is presently involved as a litigant in various proceedings in which some of its competitors are making similar demands.

While the parties have treated this case as involving a classic refusal to deal,[1] for at least one of the years for which damages were awarded, the record shows unequivocally that there was no such refusal. With respect to that year (the 1977-78 skiing season), the United States Court of Appeals for the Tenth Circuit reached the following conclusion:

> We conclude that there was sufficient evidence for the jury to conclude that plaintiff was injured through the exercise of monopoly power by defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use.

Aspen Highlands Skiing Corp. v. *Aspen Skiing Co.*, 738 F.2d 1509, 1525 (10th Cir. 1984).

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[1] American strongly agrees with the petitioner that the lower court committed error in finding that petitioner possessed an "essential facility" and had a legal duty to deal with its competitor. Because that issue will be addressed by petitioner, American does treat it here.

This conclusion suggests that a company not only must grant its competitors access to facilities which it has developed at great expense and great risk, but that it must do so on terms satisfactory to the competitors. Thus construed, the decision below essentially strips a company of the competitive advantages which it has obtained as a result of its own lawful innovation and development, and imposes court-administered utility-type price regulation on its business conduct. Moreover, it would allow a company drastically to change the balance of bargaining power in a private negotiation by using the antitrust laws and the federal courts to renegotiate a contract.

The Tenth Circuit was in error in reaching this conclusion. The antitrust laws have never been interpreted in a manner which requires socializing among all competitors the advantages which a business has obtained as a result of its own lawful innovation and initiative. While some constructions of the antitrust laws may be said to require the deevloper-owner of an "essential facility" to provide its competitors with access to that facility, the antitrust laws have not been construed to impose utility-type regulations on the prices which a business may charge for such access. To the contrary, the antitrust laws and the free enterprise system allow the developer-owner of an innovative and commercially valuable product to charge prices as determined by the marketplace, and to enjoy the rewards which accompany successful investment of risk capital.

In the cases decided by this Court which have addressed the "essential facilities" doctrine, this Court has never gone so far as to suggest that the courts

can or should determine the specific terms on which an individual owner of an "essential facility" must deal with its competitors. We are not aware of any previous occasion on which this important issue has come before the Court.

A proper resolution of this issue would balance the policies and goals of the antitrust laws with the need to preserve market incentives and vigorous competition in the free enterprise system. The balancing of those interests would reject a rule of law which grants competitors access to an "essential facility" developed by another participant in the marketplace on terms which deny the owner the inherent right to enjoy the rewards which naturally flow from its skill, innovation and business acumen.

ARGUMENT

I

This Case Involves Issues Beyond A Simple Refusal To Deal By The Owner Of An "Essential Facility"

Petitioner Aspen Skiing Company ("Aspen Skiing") was the operator of three ski areas in Aspen, Colorado. Respondent Aspen Highlands Skiing Corporation ("Aspen Highlands") was the operator of a fourth ski area in Aspen. Aspen Skiing and Aspen Highlands jointly marketed lift tickets for some fourteen years pursuant to an agreement whereby revenues were divided on the basis of surveys of actual usage. Aspen Highlands' share of revenues ranged from 13.2 percent to 18.5 percent. Its share of revenues for the 1976-1977 ski season was 13.2 percent.

Aspen Skiing offered to continue the joint marketing program for the 1977-1978 ski season at a fixed 13.2 percent of revenues, rather than sharing based upon actual usage as demanded by Aspen Highlands. A compromise was reached whereby Aspen Highlands agreed to share at a fixed rate of 15 percent.

While some of the periods at issue in this case may have involved flat refusals to deal, *Id.* at 1521, the 1977-78 season clearly did not. Even if Aspen Skiing was driving a "hard bargain" during 1977-78, using its superior competitive position and bargaining power to its advantage to obtain a premium share of revenues in a joint marketing program, we are aware of no finding below that the offer extended by Aspen Skiing in 1977-78 and accepted by Aspen Highlands amounted to a refusal to deal or the economic equivalent of a refusal to deal. Nevertheless, the court found liability. As noted earlier, the Tenth Circuit held that liability could be predicated upon the

> . . . defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use.

Id. at 1525.

Thus, the liability of Aspen Skiing for the 1977-78 season appears to have been predicated on nothing more than bargaining in the marketplace to secure competitive advantages and rewards which were inherent in its superior competitive position.

II

This Court Has Never Specified The Terms On Which An Individual Owner Of An "Essential Facility" Must Deal With Its Competitors

Although this Court has never referred to the "essential facilities" doctrine, three decisions by this Court are generally cited as the intellectual underpinnings for such a doctrine: *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973); *Associated Press* v. *United States,* 326 U.S. 1 (1945); and *United States* v. *Terminal Railroad Association,* 224 U.S. 383 (1912). *Terminal Railroad* and *Associated Press* both dealt with concerted action by a group of competitors. For example, in *Terminal Railroad* the Court stated: "The fact that the terminal company is not an independent corporation at all is of the *utmost* significance." *Terminal Railroad,* 224 U.S. at 398 (emphasis added). In *Associated Press* the Court noted: "The heart of the government's charge was that appellants had *by concerted action* set up a system of By-Laws which prohibited all AP members from selling news to nonmembers, and which granted each member powers to block its non-member competitors from membership." *Associated Press,* 326 U.S. at 4 (emphasis added).

Only in *Otter Tail* did this Court arguably deal with the application of what has since become identified as the "essential facilities" doctrine in the context of conduct by a single firm acting with respect to its own property.

In *Otter Tail* the trial court had found that Otter Tail Power Co. had monopoly power in the retail sale of electric power, and had a "dominant" position in the market for subtransmission of electric power. The

trial court also found that Otter Tail had taken steps to assure the continued maintenance of its monopoly at the retail level. The steps included refusals to deal with municipal utilities, refusals to "wheel" power from other sources over its transmission lines to municipal utilities, and other conduct aimed at preventing municipalities from establishing their own electrical utlities at the retail level.

This Court affirmed in a narrow plurality opinion (four Justices concurred in the Court's opinion, three Justices dissented and two took no part in the decision). In doing so, this Court upheld a decree which enjoined Otter Tail from refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in its service area, and from refusing to wheel electric power over its transmission lines to such cities and towns. However, neither the trial court nor this Court purported to establish the terms on which Otter Tail must deal with local utilities. Because the prices, terms and conditions on which Otter Tail would deal with local utilities were subject to review and approval by the Federal Power Commission, this Court did not address the issue suggested by the Tenth Circuit ruling quoted above in the case now before the Court.[2]

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[2] Certain lower courts have stated in *dicta* that access to an "essential facility" must be granted on "reasonable" terms. *See, e.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). However, because of the various ways in which these cases arose, no court has specifically addressed the issue.

III

In The Absence Of A Refusal To Deal, The Individual Owner Of An "Essential Facility" Is Entitled To The Competitive Advantages Created By Its Development Of Such A Facility

The antitrust laws do not prohibit the proper accumulation of market power itself, *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 62 (1911), and the owner of a lawfully-developed competitive advantage may normally determine prices in a manner consonant with the workings of the marketplace. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n. 12, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). As was succinctly stated by Judge Learned Hand forty years ago: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). The antitrust laws allow a successful competitor to enjoy the benefits which flow to it naturally as a result of its own business acumen, such as the early development of a superior product:

> It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risk and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated. . . . Because, as we have already indicated, a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the

> merits, any success that it may achieve through "the process of invention and innovation" is clearly tolerated by the antitrust laws.

Berkey Photo, 603 F.2d at 281. *See also California Computer Products, Inc.* v. *International Business Machines Corp.,* 613 F.2d 727, 742 (9th Cir. 1979). The legislative history of the Sherman Act supports this view. The Sherman Act was deemed by its sponsors not to be applicable to one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." 21 Cong. Rec. 3146-52 (1890). *See also* Kaysen & Turner, *Antitrust Policy* 19-20 (1959).

The record in this case for the 1977-78 season suggests no more than that Aspen Highlands wanted Aspen Skiing to do business with it on the terms the former desired. But the antitrust laws protect competition, not competitors, and "[t]he failure to make *more* money . . . is simply not the kind of problem which the antitrust laws address." *Sausalito Pharmacy, Inc.* v. *Blue Shield,* 544 F. Supp. 230, 235 (N.D. Cal. 1981), *aff'd per curiam,* 677 F.2d 47 (9th Cir.), *cert. denied,* 459 U.S. 1016 (1982) (emphasis added). This Court should not leave standing a decision which effectively allows a party to use the antitrust laws "to insulate [itself] from the impact of competition." *Buffalo-Courier Express, Inc.* v. *Buffalo Evening News, Inc.,* 601 F.2d 48, 55 (2d Cir. 1979).

It would be unwise to involve the courts, under the guise of enforcing the antitrust laws, in the setting of prices. One goal of the antitrust laws is to allow the free market to function in a way which will minimize

the need for governmental intervention; the antitrust laws were certainly not intended as a mechanism to increase intervention in the marketplace. The courts and others have always avoided the siren's call to engage in the direct regulation of prices. *See Byars* v. *Bluff City News Co.,* 609 F.2d 843, 864 (6th Cir. 1979); *General Motors Corp. (Crash Parts),* 3 Trade Reg. Rep. (CCH) ¶21,931 (FTC 1982); 3 P. Areeda & D. Turner, *Antitrust Law* ¶736 (1978); *see also* R. Posner, *Antitrust Law: An Economic Perspective* 211 (1976). In *United States* v. *Paramount Pictures, Inc.,* 344 U.S. 131 (1948), this Court rejected a decree which required film distributors to select exhibitors based upon competitive bidding. In doing so, this Court made it clear that an antitrust decree should not involve "as close a supervision as a continuous receivership." *Id.* at 163; *see also United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707, 728-29 (1944). While the antitrust laws may impose a duty to deal in certain cases, they do not inject the judiciary into the minutiae of setting the terms on which the parties must deal.

CONCLUSION

This Court should not permit a party to seek judicial renegotiation of contractually agreed terms of access to an "essential facility." Nor should the courts determine the terms of the contractual relationship between the parties in an "essential facilities" context unless the party in the superior bargaining position takes a posture which is tantamount to a refusal to deal. This Court should reverse the decision below with respect to the year 1977-78 because there was no re-

fusal to deal in that year and the relationship negotiated by the parties for that year should not be subject to judicial revision.

Respectfully submitted,

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